given to protect and thereby secure the deposits, such bond having been authorized and required by statute. The liabilities of the bank are not increased by such assignment and transfer. It has an asset in the deposit to offset its liability."

It is clear that under the decisions and statutes, a bank organized under the laws of Illinois has the power to give security for a deposit of public moneys, so that whatever effect is given to the 1930 Amendment, the decision herein of the Court of Appeals should be reversed.

Point IV.

The Inherent Power of Banks to Pledge Assets as Security For Deposits of Public Funds is Generally Recognized.

In addition to the federal decisions and the uniform and long continued interpretation by the department charged with administering the National Bank Act, the great weight of authority holds that banks inherently possess the power to pledge their assets as security for a deposit of public moneys.

The Courts in the following states have upheld the validity of pledges made to secure the deposits of public moneys and are generally (65 A. L. R. 1412) referred to as supporting the majority view:

Colorado.

In *McFerson* v. *National Surety Company*, 75 Colo. 482; 212 Pac. 489 (1923) the court upheld a pledge of collateral to indemnify sureties on bonds securing county funds. The only statute in effect at the time of the transaction called for a surety bond.

FLORIDA.

In *First American Bank and Trust Company, et al.* v. *Town of Palm Beach,* 96 Fla. 247; 117 So. 900 (1928), the court upheld a pledge of assets given in addition to a surety bond to secure the deposits of the Town of Palm Beach and those of the Commissioners of a lake District. The court held that statutes requiring certain *state* officials to demand security for deposits, constituted a legislatively established public policy that deposits of public funds should be secured by such pledges. To the same effect, see *Davis* v. *Knott,* 147 So. 276 (Fla. 1933).

INDIANA.

In *Schornick* v. *Butler, et al.,* 185 N. E. 111 (1933), the court on rehearing overruled its prior opinion in the case (172 N. E. 181) and held valid a pledge of assets to sureties on a bank's bond given in connection with the deposit of municipal funds, although the only statute authorizing the giving of collateral security to protect public funds provided that the pledge thereof be made direct to the municipality and specified a type of assets other than that pledged by the bank in that case.

IOWA.

In *Richards* v. *The Osceola Bank,* 79 Iowa 707; 45 N. W. 294 (1890), the court upheld a pledge of assets to secure County deposits. The collateral furnished was in addition to a surety bond, which was all that was called for by the Iowa Code. *Andrews* v. *Odebolt Savings Bank,* 203 Iowa 1335; 214 N. W. 559 (1929) is to the same effect.

KANSAS.

In *Interstate National Bank* v. *Ferguson,* 48 Kan. 732; 30 Pac. 237 (1892), the court held that a national bank in Kansas, under § 5136, U. S. Revised Statutes, providing that such a bank could exercise "all such incidental powers as shall be necessary to carry on the business of banking" could pledge assets as security for municipal funds.

MISSISSIPPI.

In *U. S. Fidelity & Guaranty Co.* v. *Bassfield,* 148 Miss. 109; 114 So. 26 (1929), the court upheld a pledge of assets to the surety company, to indemnify it against loss because of its acting as surety on a depository bond given in connection with the deposit of County funds. There were statutes requiring certain public officers to take collateral security in connection with the deposit of public money in designated depositories. There were other statutes providing that public money deposited in banks other than designated depositories should constitute trust funds. The Court held that the transaction in question did not come within either statute, but it concluded that the majority view was correct and that the pledge was valid as a matter of general law.

MISSOURI.

The court in *French* v. *School District,* 223 Mo. App. 53, 7 S. W. (2d) 415 (1928) and *Consolidated School District* v. *Citizens Savings Bank,* 223 Mo. App. 940, 21 S. W. (2d) 781 (1929) upheld pledges of assets to secure the deposits of school district funds. The only statute referred to by the court authorizing the giv-

ing of collateral to secure public moneys related solely to County funds.

MONTANA.

The court in *Ainsworth* v. *Kruger,* 89 Mont. 468; 260 Pac. 1055 (1927), held that a pledge of assets to a bank director, to indemnify him against loss as surety for the bank, on bonds given to protect County deposits, was valid.

NEW MEXICO.

In *Melaven* v. *Hunker,* 35 N. M. 408; 299 Pac. 1075 (1931), the court upheld a pledge of assets to sureties to indemnify them against loss as sureties on bonds given to secure County deposits despite the fact that the particular assets pledged were not of the character prescribed by statute.

NEW YORK.

In *Smith* v. *Lansing,* 22 N. Y. 520 (1860) *supra, Application of Broderick,* 252 N. Y. Supp. 68; 140 Miss. Rep. 861 (1931), and *In re Bank of Spencerport,* 255 N. Y. Supp. 482; 143 Miss. Rep. 196 (1932), the courts have upheld pledges of assets given as security for public moneys,—in the *Smith* case for State funds, in the *Broderick* case for school district funds, and in the *Spencerport* case for town funds. In the *Spencerport* case the statute prescribing the manner of depositing town funds merely called for a surety bond. In the *Broderick* case the statute called for "security". The decision in the *Smith* case was based entirely upon the court's understanding of the general law and no statute was referred to.

In *State Bank of Commerce* v. *Stone,* 261 N. Y. 175, 184 N. E. 750 (1933), the Court of Appeals, confining itself to private deposits, held that while a bank had no power to pledge assets for such deposits, the receiver could not reclaim the assets pledged, without repaying the deposit thereby secured.

NORTH CAROLINA.

The courts in *Page Trust Co.* v. *Rose,* 192 N. C. 673; 135 S. E. 795 (1926) and in *Richmond County* v. *Page Trust Co.,* 195 N. C. 595; 142 S. E. 786 (1928), upheld pledges made by the same bank to different individuals, to indemnify them as sureties on the bank's bond given in connection with the deposit of County funds. The North Carolina statutes required the public officials to take a surety bond, but did not provide for the taking or the giving of collateral security in lieu thereof.

OHIO.

In *Snider* v. *Fulton,* 44 Ohio App. 238, 148 N. E. 839 (1932), the court held a pledge given to the State Superintendent of Banks as security for the deposit by him of funds of a closed bank, valid. In so holding, the court pointed out that while Ohio statutes requiring officials to take collateral security in connection with deposits of state, county and municipal funds were not applicable, they did disclose a public policy in favor of protecting the particular fund in question.

OKLAHOMA.

In *Mays* v. *Board of County Commissioners of Creek County*, 23 Pac. (2nd) 664 (Okl. 1933), in 1927 a national bank in Oklahoma pledged certain of its assets to secure county funds. In upholding the validity of the pledge, the court first held that a national bank possessed the general power to pledge its assets as security for public deposits, referring to various Federal cases, including the decision of the District Court in our case, 58 Fed. (2nd) 341, and rejected the cases announcing the minority rule, stating (p. 668) that they were not

> "in any way persuasive * * * for the reason that we are governed by the rules declared by the Federal courts in so far as they announce a rule relative to national banks and we are controlled by our statute in so far as State banks are concerned."

The court then referred to the various Oklahoma statutes relating to deposits of public funds and, after considering the effect of various amendments thereto, concluded that pledges of assets could be made to secure county funds, and rejected with brief comment the contention that the pledge was invalid because of non-compliance with certain formalities provided for in the Oklahoma statutes.

With reference to the Oklahoma statutes the court cited *Maryland Casualty Co.* v. *Board of County Commissioners*, 128 Okla. 58, 260 Pac. 1112 (Nov. 1927) to the effect that a statute prohibiting pledges securing deposits had been repealed, in so far as it related to county deposits, by a subsequently enacted statute specifically dealing with county funds. In that case, the court held that the latter statute authorizing the pledging of assets in lieu of or in addition to a surety bond did not author-

ize a pledge of assets in addition to a surety bond where the amount of the bond exceeded the amount on deposit by the county and accordingly that the surety company on the bond could not avail itself of such pledge. The court did not have occasion to pass on the general question as to the power of banks to pledge their assets as security for public deposits.

In *Mothershead* v. *U. S. F. & G. Co.* 22 Fed. (2d) 664, C. C. A. 8th (Oct. 1927), certiorari denied, 276 U. S. 637 (1928), it appeared that numerous Oklahoma State banks pledged certain of their assets to a surety company to indemnify it against loss on account of its liability as surety on various public depository bonds of such banks. The Bank Commissioner in charge of the liquidation of the depository banks contended that such pledges were *ultra vires*. The court rejected this contention and pointed out that under the Oklahoma law the bank could have pledged these assets directly to the depositor in lieu of a surety bond and therefore that a pledge made directly to the surety was valid.

PENNSYLVANIA.

In *Cameron* v. *Christy,* 286 Pa. 405; 133 Atl. 551 (1926), the court upheld a pledge of assets to secure the deposits of county funds although there was no statute providing therefor. The court relied upon its earlier decision in *Ahl* v. *Rhoads,* 84 Pa. 319 (1877) and commented upon the fact that the practice of giving pledges of that character was common in Pennsylvania.

TENNESSEE.

In *Grigsby* v. *Peoples Bank*, 158 Tenn. 182, 11 S. W. (2nd) 673, (1929), a State bank's pledge of assets to indemnify the sureties on a bond given in connection with the deposit of State and County funds was held valid. The only applicable statute was one which provided that any bank might become a public depository of money of the state by executing a bond to secure such funds. The Court held that this evinced a legislative intent to require security for state funds and stating that "the record presents a legal question which is determinative and may thus be stated: Can a state bank, engaged in the general banking business, pledge its assets to secure general depositors," answered the question in the affirmative.

UTAH.

In *Pixton* v. *Perry*, 72 Utah 129, 269 Pac. 144 (1928) a state bank pledged certain of its assets to secure a deposit of county funds. It appeared that at that time there was in force a statute which prohibited preferences to any depositor by pledging the bank's assets as collateral security and there was another statute which provided with reference to public funds that the public officer having custody thereof take from the depository "collateral security" or a bond. It was contended by the State Bank Commissioner in charge of the liquidation of the bank that under such statutes the pledge of assets was invalid, and that only a bond could be furnished as security. In rejecting this contention the court held that the latter statute was controlling and, after

referring to the cases representing the so-called majority and minority view with reference to the power of a bank to pledge its assets to secure public deposits, stated (p. 145) "we find it unnecessary to determine which line in our opinion states the better rule or which is better grounded on legal principles."

In *Millard County School District* v. *State Bank,* 14 Pac. (2d) 967 (Utah, 1932) a State bank between May 11 and May 15, 1929 pledged certain of its assets consisting in part of notes and mortgages to secure a deposit of school district funds. It appeared that on May 14, 1929, an amendment was passed to the Act relating to deposits of public funds which provided that only United States, State and municipal bonds could be accepted as collateral security. The court first held that the pledge of assets occurred before this amendment went into effect and therefore that under the decision of *Pixton* v. *Perry, supra,* the pledge of assets would be valid. The court further held that even if the transaction took place after May 14, 1929, the pledge would be valid even though not consisting of the type of assets referred to in the 1929 amendment and that in any event the Bank Commissioner, as well as the bank, would be estopped from asserting the invalidity of the pledge.[1]

The decisions in the states of Arizona and Nebraska have not consistently aligned themselves with either the majority or minority view, but we comment on them for purposes of completeness.

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[1]Subsequent to these decisions, the Legislature prohibited pledges to secure deposits with certain exceptions (Laws of Utah, 1933, c. 47, p. 84 *et seq.*).

ARIZONA.

Although the court in *Williams* v. *Hall*, 30 Ariz. 581; 249 Pac. 755 (1926) and *Williams* v. *Earhart*, 34 Ariz. 565; 272 Pac. 728 (1929), upheld pledges of assets to secure the deposits of public moneys, the same court in the later case of *Button* v. *Sanguinetti*, 11 Pac. (2d) 1085, attempted to explain its previous holdings in the *Hall* and *Earhart* cases upon the estoppel theory.

NEBRASKA.

In *Bliss* v. *Mason*, 121 Neb. 484, 237 N. W. 581, (1931), a State Bank pledged certain of its assets consisting in part of corporate bonds and foreign Government bonds to sureties on a county depository bond. At the time the transaction took place there was a statute which provided for the giving of security as collateral for county deposits, but did not include the type of securities above mentioned. The court in upholding the validity of the pledge followed what it termed the majority view, holding that the bank was not limited to a pledge consisting of the type of securities enumerated in the statute, and also that such a pledge could be made directly to the sureties as well as to the county.

In *Bliss* v. *Pathfinder Irr. Dist.*, 122 Neb. 203, 240 N. W. 291, (1932), a state bank pledged its assets directly to an irrigation district to secure a deposit made by the latter. The court in holding the pledge invalid first pointed out that an irrigation district was not a municipal corporation and its deposits were not covered by the statutes providing for the pledging of assets of a bank to secure certain public deposits. The court expressly limited the holding of *Bliss* v. *Mason* to county funds, cited approvingly the cases upholding the minority view.

The courts in the following states have held that banks in the absence of statute do not have the power to pledge assets as security for deposits of public moneys, and represent what has been referred to as the "minority view."

ARKANSAS.

In *Arkansas-Louisiana Highway Improvement District* v. *Taylor,* 177 Ark. 440; 6 S. W. (2d) 533 (1928) and in *Arkansas County Road Improvement District* v. *Taylor,* 185 Ark. 293; 47 S. W. (2d) 27 (1932), the court held the pledges invalid to secure deposits of highway and School District funds. There was a statute calling for the giving of certain types of collateral security in lieu of a surety bond. The collateral was not of the specified type and the court held that the power to pledge assets should not be extended beyond that expressly authorized by the legislature.

CALIFORNIA.

In *Wood* v. *Imperial Irrigation District,* 216 Calif. 748, 17 Pac. (2d) 128, (1932), a State bank in 1925 pledged certain of its assets as collateral security to a deposit by an irrigation district. It appeared that under the laws then in force such a pledge could have been made as collateral to deposits of the State, County, municipalities or other political subdivisions, and that in 1927 a statute had been enacted which permitted the pledge of collateral to secure the deposits of irrigation districts. The court first held that the irrigation district was not a "municipal corporation" or "political subdivision" within the meaning of the constitutional provision referred to above, and also that the 1927 Act would not be applicable to a transaction which had taken

place previous thereto. The Court then based its decision on the ground that in the absence of a statutory provision expressly approving the pledge "the general policy of the law will not sanction it," relying on the decisions representing the minority view. The court also held that the State Superintendent of Banks, as trustee in charge of the liquidation of the bank, was not estopped to assert the illegality of the pledge.

KENTUCKY.

In *Commercial Bank and Trust Company* v. *Citizens Trust and Guaranty Co.*, 153 Ky. 566; 156 S. W. 160 (1913), a pledge of assets by a state bank to a surety company to indemnify it against loss for acting as surety on the bank's bond to the County Treasurer, was held invalid. The court decided that the banking laws did not grant the power expressly, and that it could not be implied. The court found that for many years state officials had invariably construed Ky. St., Sec. 4693, requiring security from depositories for state funds, and Sections 411 and 2903 *id.*, requiring security from depositories for certain court and city funds as calling for individual or corporate sureties only and not for pledges of assets. There was no statute calling for security of any kind from depositories of County funds.

In 1918, however, a statute was enacted permitting state banks to pledge their assets as collateral security for deposits of United States funds (Ky. Statutes, Carroll's 1930 Ed., Sec. 579), and in 1932, a similar statute was enacted relative to various types of public funds (Ky. Acts, 1932, c. 13, p. 46).

MINNESOTA.

In *Farmers and Merchants State Bank* v. *Consolidated School District No.* 3, 174 Minn. 278, 219 N. W. 163 (1928), a pledge to secure School District funds was held invalid. There was a statute providing that qualified depositories could pledge certain specified collateral security in lieu of a surety bond. The court found that the bank had not qualified as a depository and the securities pledged were not of the type authorized by the statute. The court held that the power to pledge assets, except where expressly authorized by statute, was contrary to the public policy of the state, and that Chapter 257 G. L. 1927, prohibiting them, enacted subsequent to the transaction involved, merely expressed the public policy of the state as it had previously existed.

NORTH DAKOTA.

In *Divide County* v. *Baird,* 55 N. D. 45; 212 N. W. 236 (1926), a pledge to secure County funds was held invalid. The only statute involved required the County Treasurer to take a personal bond, or in lieu thereof a surety bond. There were no statutes referred to authorizing the giving of collateral security to secure any public funds.

TEXAS.

In *Foster* v. *City of Longview,* 26 S. W. (2d) 1059 (Commission of Appeals 1930) reversing 11 S. W. (2d) 217 (Court of Civil Appeals), a state bank pledged certain of its assets to secure a deposit of city funds, and at that time there was no statute providing for the pledging of any type of collateral to secure such deposits. The court, in holding such pledge invalid, stated that in

the absence of any statutory authority, such pledge was forbidden by public policy, and illegal. In *Austin* v. *Lamar County*, 26 S. W. (2d) 1062 (1930) reversing 11 S. W. (2d) 553, (Court of Civil Appeals), the same court on the same day held invalid a pledge made by a state bank to secure a deposit of county funds, because the assets pledged were not of the type specifically provided for in a statute then in force relative to county funds. The court, in following *Foster* v. *City of Longview, supra*, held that such pledges were against the public policy of the state since not expressly authorized by statute.

These courts, following the minority view, which refused to sustain the validity of pledges of assets as security for public funds, reached their decisions by holding that in the absence of express statutory authorization, banks have no such power and that statutes authorizing the pledging of assets of a certain kind in lieu of surety bonds are exclusive and permit of no other type of collateral. In the last analysis, however, the opinions in these cases demonstrate that they are predicated upon the view that such pledges are opposed to public policy; that they perpetrate a type of constructive fraud upon unsecured depositors in favoring a limited number of secured depositors as opposed to the greater number of general depositors, who, because of the secrecy usually existing in such pledges, have no means of knowing the extent of the bank's reported assets that are so pledged. That no basis for such view exists, was clearly pointed out by Circuit Judge Alschuler in his dissenting opinion in 64 Fed. (2d) 721, 731 (R. 118) where he said:

> "It is pointed out, in support of such a public policy of the state, that ordinarily there is secrecy

in such pledges of which the general public has no notice, and that depositors not so secured would usually have no means of knowing how much of the bank's reported assets are so segregated.

It seems to me that the vice is not with the pledging of the assets, but with the laws and regulations concerning reports and advertisements of banks. I fully agree that banks should be required to make frequent public reports of their condition, and that in such reports it should be specifically disclosed what part of the reported assets is so pledged. To my mind it is vicious practice to permit banks to advertise their 'resources' at an amount inclusive of their total deposits, without requiring that at the same time, and quite as prominently, there be stated the liabilities to which the resources are subject.

It is also pointed out that such pledging of a bank's assets may, in case of the bank's threatened disaster, enable certain depositors to be favored as against others. This, of course, would bring into the picture collusion and probably fraud, which would be dealt with when it appears, but which is not involved here, where concededly there was no suggestion of circumvention or favoritsm, and where, at the time of the pledge, the bank was solvent."

Courts in upholding pledges to secure public funds have expressed themselves in like manner.

In *Grigsby* v. *Peoples Bank,* 158 Tenn. 182; 11 S. W. (2d) 673 (1929) *supra,* the court said:

"Our statutes, requiring periodical published statements of the condition of banks, makes it a serious offense to publish a false statement. Shannon's Annotated Code, Chaps. 2104—2104a4. A true statement would include 'secured deposits,' and it is the duty of the banking department of the state to require this in the form which it is authorized to provide for such statements. If this is done, we are unable to see how any hardship can result to unsecured depositors or stockholders further than would result where the bank borrowed a fund and pledged its assets as security."

In *First American Bank & Trust Co. et al.* v. *Town of Palm Beach,* 96 Fla. 247; 117 So. 900, (1928) *supra,* the court stated:

> "It has been contended that, to hold that the pledging of securities to pretect deposits in state banks would be unfair to other depositors who are unsecured, because the financial reports of banks show as a part of the assets securities which are pledged to protect deposits, without indication that such securities are so pledged. If this contention is true, it may be easily obviated by the state comptroller requiring financial statements and reports of state banks to show what amounts of the assets of the bank is pledged as security for deposits."

An examination of the statutes of the different states in the Union demonstrates that legislative bodies generally, recognize that the public welfare demands that public funds deposited in banks be adequately protected, and have utilized the power of banks to pledge their assets as security for public funds.

In at least thirty-seven states there are statutes providing that public officials may take a pledge of securities from banks as distinguished from a surety bond for the protection of various types of public funds.[1]

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[1] *Alamaba,* Code 1928, § 893 (State Funds); *Arizona,* Laws 1923, c. 45, Laws 1927, c. 71 (Public Funds Generally); *Arkansas,* Acts 1931, Act 212, p. 684 (State Funds), Acts 1927, Act 182, p. 634 (Funds of various Improvement Districts); *California,* Statutes and Amendments 1923, p. 21 (State Funds), p. 25 id. (County and Municipal Funds), Statutes 1927, p. 188 (Irrigation District Funds); *Colorado,* Laws 1927, p. 206 (County Funds); *Florida,* Compiled General Laws 1927, § 6079 (Public Funds Generally), §§ 173, 174 id. (State Funds); *Georgia,* Laws 1931, p. 120 (State Funds); *Idaho,* Code, Ann. (1932), Title 55, p. 74 *et seq.* (Public Funds Generally), Title 65, §§ 2625, 2626, id. (State Funds); *Illinois,* Laws 1919, p. 954

As stated by this Court in *Twin City Co.* v. *Harding Glass Co.*, 283 U. S. 353, 357 (1931):

> "Primarily it is for the lawmakers to determine the public policy of the state."

In view of such extensive legislation providing for

(State Funds), Laws 1929, p. 174 (Funds of State Bank Receiver); *Indiana*, Burns Ann. Statutes 1926, § 10321 (Deposits of Sinking Fund Commissioners), § 12622 id., as amended, Acts 1929, c. 132, p. 437 (Public Funds Generally); *Kansas*, Laws 1927, c. 89, § 1 (State, Postal Savings and Public Funds Generally); *Kentucky*, Acts 1932, c. 13, p. 46, amending § 579 Kentucky Statutes, Carroll's 1930 Ed. (United States and Public Funds Generally); *Louisiana*, General Statutes (Dart) § 6639 (State and Public Funds Generally); *Maryland*, Ann. Code (Bagby, Art. 90, § 9) (State Funds), Laws 1933, p. 1092 (Funds held by bank commissioner as receiver of closed bank; Laws 1931, p. 1093, empowering state banks to deposit securities for the purpose of securing deposits of the United States, State, County, City, Town, and other political subdivisions of the State of Maryland; *Michigan*, Compiled Laws 1929, § 348 (State Funds), Public Acts 1931, No. 22, p. 33, as amended, Public Acts 1932, No. 31, p. 47 (Public Funds Generally); *Minnesota*, Laws 1933, c. 41 (Public Funds Generally); Laws 1925, p. 173 (State Funds), Laws 1925, c. 202 (Funds of Cities Operating Under Home Rule); *Mississippi*, Code 1930 Ann., c. 105, § 4326 (State Funds), § 4346 id. (County Funds), § 4357 id. (Drainage District Funds), § 4358 id. (Municipal Funds); *Missouri*, Laws 1931, p. 378 (State Funds), Laws 1927, p. 324 (Funds of Cities of the First Class), Rev. Statutes 1919, § 9585 (County Funds); *Montana*, Laws 1909, c. 129, § 1 (State Funds), Rev. Codes Supp. (1923-27), § 4767 (County, City and Town Funds); *Nebraska*, Laws 1933, c. 147, p. 564 (State Funds), Compiled Statutes 1929, c. 77, § 2508 (County Funds), 1931, c. 28, p. 115 (Funds of Cities of the First Class); *Nevada*, Compiled Laws, (Hillyer, 1929) § 7032 (State and County Funds); *New Mexico*, Laws 1933, c. 175, § 6 (Public Funds Generally, Including State); *New York*, Laws 1931, c. 45, as amended Laws 1932, c. 97, (County Funds), Cahill's Cons. Laws (1930), c. 15, § 254 (4) (School Funds), c. 57, § 10 id. (State Funds), c. 57, § 11 id. (funds of charitable and benevolent institutions supported by the State), c. 65, § 89 (20) id. (Village Funds), also see Greater New York Charter, § 196, as amended Laws 1917, c. 617; *North Carolina*, Laws 1925, c. 128, § 2 (State Funds); *Ohio*, 1 Page's Ann. Ohio Gen. Code §§ 330-3, as amended, 4 Page's Ann. Ohio, Gen. Code, p. 12 (State Funds),

pledges by banks to secure public deposits, it seems unreasonable to contend that a practice so widely sanctioned is contrary to public policy.

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1 Page's Ann. Ohio Gen. Code, § 2732 (County Funds), § 4295 id. (City and Village Funds); § 7605 id. (School Funds); *Oklahoma*, Statutes 1931, Sec. 5416 (State Funds), § 5459 id. (School Funds), § 7428 id. (County Funds); *Oregon*, Laws 1925, c. 207, § 90, p. 307, as amended, Laws 1933, c. 227, Sec. 7, p. 316 (Public Funds Generally, Including State, United States and Postal Savings Funds); *Pennsylvania*, Laws 1929, p. 865 (City Funds), Laws 1906, p. 45 (State Funds); *South Carolina*, Special acts have been passed from time to time, providing with specific reference to deposits of certain counties, that the county treasurer require the depository bank to deposit either a surety bond or certain types of security as collateral for the deposit, see, *e.g.*, Acts 1930, Act 1039, p. 887, Acts 1927, Act 47, p. 86, Acts 1926, Act 514, p. 952; *South Dakota*, Compiled Laws 1929, § 6875 (State Funds), § 6883 id., as amended, Session Laws 1929, p. 100 (County Funds), Compiled Laws 1929, § 6344, as amended, Session Laws 1929, p. 217, Session Laws 1931, p. 154, as amended, Sessions Laws 1933, p. 90 (School Funds); *Tennessee*, Public Acts 1931, c. 104, p. 361-365 (State Funds); *Texas*, Rev. Civil Statutes 1925, Art. 2429, p. 664, as amended, General Laws 1933, c. 240, p. 840, c. 244, p. 54 (State Funds), Art. 2547, p. 670 Rev. Civil Statutes 1925 (County Deposits), Laws 1929, c. 61, p. 160, expressly provides that a bank may pledge its assets as collateral security for certain public deposits; *Virginia*, Code (1930) Ann. § 2158 (State Funds); *Washington*, Remington's Compiled Statutes (1922), § 5549 (State Funds), §§ 5569, 5572 id. (City Funds), §5563 id. (County Funds), also see, Sess. Laws 1931, c. 87, p. 255 *et seq.* increasing the type of securities available as collateral under the above sections; *West Virginia*, Acts of Legislature, Extra Sess. 1932, c. 8, p. 13 (County Funds); *Wisconsin*, Statutes 1929, c. 60, § 29 (25) (Town Funds), c. 20, § 35 (38) id. Village Funds), c. 62, § 13 (c) id. (State Funds); *Wyoming*, Laws 1907, c. 30, § 8, as amended, Laws 1909, c. 94 (State Funds), Laws 1907, c. 30, § 20 (County, City, Town and School Funds), also see, Session Laws 1925, c. 83, p. 86, and c. 157, p. 220 id.

Point V.

The Receiver Should Not Under Any Circumstances Have the Relief He Seeks.

The Receiver's suit is addressed to the equity side of the Court, and he seeks equitable relief. If the facts proved do not show that equitably he is entitled to the relief prayed, then his bill should be dismissed. He had no statutory authority to disaffirm the pledge which was made; the pledge was not made in contemplation of insolvency, and consequently the provisions of Section 52 of the National Bank Act, *supra,* prohibiting pledges and other transfers in contemplation of insolvency, are not applicable.

Pledges of assets by national banks as security for public deposits of states, or other political subdivisions thereof, are not prohibited by the National Bank Act; they are not *malum in se,* nor contrary to the public policy of the federal government. National banks have general power to secure such deposits; the most that can be claimed is that there is a limitation upon the exercise of the power by certain banks or in certain states. It cannot be contended, therefore, that this pledge was unlawful *per se;* the most that can be claimed is that the bank in question exercised a general power conferred upon it in an improper manner. There is neither rule of law nor reason for requiring that the public suffer loss of security for its funds under these circumstances. The recent decision of the New York Court of Appeals in *State Bank of Commerce* v. *Stone,* 261 N. Y. 175, 184 N. E. 750 (1933) *supra,* supports this contention. To the same effect, see *Millard County School District* v. *State Bank,* 14 Pac. (2nd) 967, 973 (Utah, 1932) *supra.*

The transactions of which the Receiver complains were fully executed at the time of his appointment; there has been no attempt to prove that any general creditor of the

bank has actually been injured or will suffer damage by reason of the bank's bonds having been pledged in order to obtain deposit of the city's funds. There is no contention that the value of the bonds pledged was excessive in proportion to the amount of city funds deposited. Of course, if the pledge had not been made, the proceeds of the bonds would, presumptively, be available in their entirety for distribution to general creditors. But, if the pledge had not been made, the bank's currency would, on the other hand, be diminished to the extent of the amount of the city's funds on deposit, and any gain to general creditors, on the one hand, would be offset by equal loss on the other. The bank itself could not have recovered its bonds without having repaid the city the amount of funds it had on deposit. If the bank had repaid the city and recovered its bonds, the amount of the bank's assets standing as security for other depositors would not have been increased one penny's worth. Other depositors, or the Comptroller of the Currency of the bank, could not, prior to its insolvency, have compelled or obtained recovery of the bonds pledged without repayment of the city's deposit. To permit the recovery, therefore, by the Receiver of the bonds pledged, without repayment of the deposit liability secured thereby, is to create in the Receiver a right, for the benefit of general creditors, which did not exist either in their favor or in favor of the bank prior to his appointment, and for which no equitable basis exists. To condemn as void a transaction, fully executed and not at the time it was entered into injurious to the bank or its depositors, and to permit the Receiver to retain the benefit of the transaction and disclaim its liability, does not satisfy that sense of justice which is equity. Congress has not intended that such a result shall be accomplished. It has declared void only such transfers or assignments of a bank's assets, after the commision of an act of insolvency, or in contempla-

tion thereof, as are made with a view to the preference of one creditor to another; by as strong implication as can be gathered from language used, the recovery of assets, transferred in ordinary course of business, for value received, and without contemplation of insolvency, is prohibited. If the deposits made by Carroll in the Herrin bank be regarded as made in violation of the provisions of the Illinois Commission Form of Government Act, then, in accordance with the usual rule, the bank became a trustee *ex maleficio* because of its receiving the deposit, and, in equity, the bonds pledged as security for the deposit should be regarded as impressed with a trust in favor of the city.

The Receiver did not in this case bring himself within the provisions of Section 52 of the National Bank Act by showing that the pledge resulted in a preference; he did not make out a case for relief appealing to the conscience of the Court, or requiring the interposition of a court of equity, and his bill should, therefore, be dismissed.

Petitioners respectfully submit that for the reasons above stated the judgment of the Circuit Court of Appeals herein should be reversed, and the decree of the District Court dismissing the bill be affirmed.

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